No. 2413.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWIN F. MEYER and
EMAR GOLDBERG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Plaintiffs in Error.

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Filed this ..... day of December, A. D., 1914

FRANK D. MONCKTON, Clerk.

By ..... Deputy Clerk

THE TEN BOSCH COMPANY, SAN FRANCISCO

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THE UNITED STATES OF
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REPLY BRIEF OF PLAINTIFFS IN ERROR

The defendants, in their reply brief, attempt to contradict plain and indisputable facts proven on the trial, in a futile endeavor to establish that the check in the case at bar was delivered on June 1, 1908, instead of on May 26, 1908, as unquestionably proven. They make this bold statement, in an

attempt to resolve this into a question of fact, thereby admitting their inability to successfully controvert our argument as a question of law:

> "THE RECORD IS NOT CLEAR AS TO THE TIME OF THE DELIVERY OF THIS CHECK OR THE PERSON TO WHOM IT WAS DELIVERED." (Brief of Defendant in Error, p. 21.)

There is not a syllable of evidence to the effect that this check was delivered on June 1st, 1908, and they do not point out any evidence. Here is the absolutely conclusive evidence of both Government and defendant showing that the check was delivered on the 26th day of May, 1908. There is not a word to the contrary.

> "Mr. Schlesinger: I want to call your attention, Mr. Kettlewell, to what purports to be a copy of a public bill. Do you recognize that as a true copy?
>
> A. Yes, sir; I think that is a true copy.
>
> * * * * * * * *
>
> Q. Now, calling your attention to this stamp (showing), will you kindly read that aloud so the jury may hear you?
>
> Mr. Allen: Is that introduced in evidence?
>
> Mr. Schlesinger: Yes, and marked Exhibit 'G.'
>
> A. 'United States Navy Pay Office, Seattle, Washington. Paid May 26, 1908. Robert H. Orr.' The rest is blurred.

Q. And that is marked 'Paid,' is it, on May 26th, 1908? I will ask you whether the check was delivered together with that paper on that date?

A. I think that it must have been, yes.

The Court: What date was that?

Mr. Schlesinger: May 26th, 1908. If it had not been so delivered it would not bear the imprint 'Paid,' would it?

A. No, I think not." (Trans., p. 428-429.)

The testimony of J. A. Kettlewell, the chief Government witness, shows the date of the delivery of this check, and is substantiated by the testimony of Emar Goldberg, and the receipted bill conclusively shows that the check was delivered on the 26th day of May, 1908.

"Q. Now, Mr. Kettlewell, I show you Plaintiff's Exhibit '5' and call your attention to the photographic copies of that first instrument there. Do you know what the instrument is of which this is a photographic copy?

A. Copy of check issued from the navy pay office in payment for this Fowler Metal Company's zinc.

Q. When that check was made out, then what happened?

A. When this check was made out I phoned to Mr. Goldberg and told him that the check was ready, and the check was delivered either to Mr. Goldberg or to Mr. Silverstone, I don't remember which.

Q. What day was it delivered?

A. Delivered June first, no DELIVERED—DELIVERED—DELIVERED THE DAY IT WAS DATED, MAY THE 26TH.

Q. May the 26th?

A. The DAY IT WAS DATED.

Q. You don't remember to which MAN it was delivered?

A. I couldn't say.

Mr. Schlesinger: YOU MEAN MAY 26, 1908?

A. 1908, YES, SIR.

Q. When the check was delivered?

A. Yes, sir, THE DAY THE CHECK WAS MADE, AS I REMEMBER, IT WAS DELIVERED.

Special Counsel Mr. Riddell: AS YOU REMEMBER, THE CHECK WAS DELIVERED THE DAY IT WAS MADE?

A. As I remember. It may have been delivered the next day, but I THINK IT WAS THE DAY IT WAS DATED. That was the usual procedure, and I know we would want to get rid of it as soon as possible." (Trans., pp. 304-307.)

Emar Goldberg, corroborating his testimony, said:

"Q. What date was it that you received the checks from his hands?

A. On the 26th day of May.

* * * * * * * *

Q. In other words, you received that check upon the 26th day of May, and that check rested in your office until the 31st day of May?

A. Until the 1st day of June. (Trans., p. 715.)

Q. What, if anything, accompanied that check?

A. What they call a public bill.

Q. Have you that public bill with reference to this?

Mr. Allen: It is in evidence.

Mr. Schlesinger: What is the number of the exhibit?

Mr. Shipley: Why, it is here, Mr. Schlesinger.

Mr. Schlesinger: I will ask you whether this so-called public bill accompanied that check?

A. Yes, sir, this public bill was with the check.

Mr. Kerr: Refer to it as an exhibit number.

A. Yes, this is defendant's Exhibit Letter 'G.'

Q. What did you do with this public bill at the time that it was given to you by Kettlewell together with the check?

A. Put the bill in our files, put this in our files.

Q. On what date?

A. ON THE 26TH DAY OF MAY, 1908. (Trans., p. 716.)

We submit, without further remarks, that our contention as to the day on which the check was delivered is correct, and not subject to dispute.

NOT ONLY IS THE EVIDENCE CONVINCING THAT THE RECEIPT OF THE CHECK WAS THE LAST OVERT ACT, BUT THE INDICTMENT ITSELF CLAIMS AND ADMITS THAT THIS WAS THE FINAL CONTEMPLATION AND OBJECT OF THE CONSPIRACY.

We think the whole issue in this case can be expressed in a single proposition, namely: What was the date of the last overt act of the conspiracy? It has been our contention, and still is our contention, that the last overt act was at least the receipt of the check on May 26, 1908. It is the contention of the government that the last overt act occurred on June 2nd, 1908, when the check was deposited in a bank.

We have shown that the check was delivered and received as payment; that after its receipt no transactions with the government of any nature whatever were necessary. We have shown that the conspiracy is ended with the date of the receipt of the check, and that an overt act cannot possibly succeed the completion of the substantive offense, which itself was to defraud the government out of a check. The indictment itself bears this out when it states that the substantive offense at which the conspiracy aimed, was the GETTING OF A CHECK from the government and not the depositing of the check, which they were to receive from the government.

On page 8 of the indictment we find the following:

> "That the said fraudulent scheme contemplated that * * * "

Then follows a number of things which the scheme contemplated, ending up finally on page 12 with the following object contemplated by the conspiracy:

> "should recommend and secure the issuance by the Paymaster at the United States Navy Pay Office at Seattle, Washington, of a check pay-

able to the order of the said Fowler Metal Company according to the account so to be rendered as aforesaid, and should arrange to have said check delivered to said E. Silverstone or said Emar Goldberg."

And that this check was delivered as and for payment, and was received as such, is clearly settled by the terms of the indictment itself, for it states:

> " * * * AND IN ISSUING, MAILING AND DELIVERING TO THE SUCCESSFUL BIDDER THE CHECK OF THE PAYMASTER OF THE UNITED STATES NAVY PAY OFFICE AT SEATTLE, WASHINGTON, FOR AND IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER FOR SUPPLIES SO FORWARDED TO THE STOREKEEPER, NAVY YARD, PUGET SOUND, WASHINGTON." (Trans., p. 6.)

The offense is thus circumscribed by the plain terms of the indictment. In other words, the scheme contemplated finally that the Paymaster of the United States Navy Pay Office should deliver a check to E. Silverstone or Emar Goldberg, and this delivery occurred on May 26th, 1908.

It is our contention, as will be seen by reference to our opening brief, that the check was received as absolute payment, and therefore ended both the conspiracy itself and the substantive offense.

Counsel for the defendant in error have to admit, and do admit in several places in their brief, that by agreement between the parties a check may be

accepted as final payment, and completely terminate the transaction between the parties thereto. On page 41 they make the following statement in italics:

> "A check is not payment unless by express stipulation or distinct agreement of the parties, they so agree."

In support of this proposition they cite six cases. We call the Court's attention to the limitation expressed thereof—UNLESS BY EXPRESS STIPULATION OR DISTINCT AGREEMENT OF THE PARTIES, THEY SO AGREE.

On page 45, they quote from the case of *Duncan* v. *Kimball,* 3 Wall. 37, 18 L. ed. 50. Beneath that they make the following statement:

> "The words of Chief Justice Marshall were quoted with approval in the case of *Segrist* v. *Crabtree,* 33 L. ed. 126:
>
> " 'That a note, WITHOUT A SPECIAL CONTRACT, would not, of itself, discharge the original cause of actions, is not denied.' "

The learned counsel go on to express the status of a check in the State of Washington. They cannot get away from this limitation as regards payment by check, even in the cases that they cite in that jurisdiction.

On page 47 we find them quoting from the case of *Benham* v. *Columbia Canal Co.,* 74 Wash., 110-119, as follows:

> "It is the general, if not the universal, rule that payment in anything other than money can only be made upon the distinct AGREEMENT OF THE CREDITOR WITH THE CONSENT OF THE DEBTOR TO ACCEPT THE THING AS PAYMENT."

On the next page is a quotation from the case of *Exchange National Bank* v. *Hunt,* 75 Wash. 516, as follows:

> "The question then is, did the taking of the promissory note for a pre-existing liability, which was covered by the guaranty, constitute a payment of the debt, and thereby release the guarantors? The rule is that the taking of a promissory note for an antecedent liability does not constitute payment of the debt IN THE ABSENCE OF AN AGREEMENT TO THAT EFFECT, OR EVIDENCE THAT SUCH WAS THE INTENTION OF THE PARTIES."

The learned counsel, therefore, evidently acknowledged that our statement of the law is correct. It cannot be questioned that the Government could have delivered a bond in payment, a mortgage in payment, or any other instrument in payment; and if accepted as such, it certainly would end the transaction, regardless of whatever use the recipient might make of the article or instrument so received.

Now, the only question remaining is: What is

the evidence in support of our proposition? That we will now attempt to set forth.

The indictment sets out the duties and powers of Kettlewell. Besides other duties and powers, he had a duty, power and discretion in "mailing and delivering to the successful bidder the check of the Paymaster of the United States Navy Pay Office at Seattle, Washington, FOR AND IN PAYMENT OF THE CLAIM OF SUCH SUCCESSFUL BIDDER for supplies so forwarded to the Storekeeper, Navy Yard, Puget Sound, Washington." (Trans., p. 6.)

In other words, Kettlewell not only had the power to deliver the check, but he had the power to deliver it *in payment* of the claim of the successful bidder, and that it was so delivered, as and for payment, the indictment avers, and this fact is not disputed.

It is true that Kettlewell is conceded to be a great scoundrel and monumental liar; but he is the Government's witness, and as to the date of the delivery of this check, he certainly should be believed, especially as he is corroborated by documentary evidence (Exhibit G, Public Bill), and all of the evidence in the case. Therefore, with respect to this phase of the case, he is not to be disbelieved. And the receipted public bill, Exhibit G, showing payment on May 26, 1908, demonstrates our position beyond any question. This bill is stamped "Paid, May 26, 1908."

In the recent case of *McKenzie* v. *Ray,* 48 Cal. Dec. 453, decided October 13, 1914, the effect of a receipt is discussed by the Court. We quote as follows:

> "The Court properly decided the question regarding the effect of a receipt in full. WHILE NEITHER AN ORDINARY RECEIPT NOR A RECEIPT IN FULL IS CONCLUSIVE AGAINST ALL ATTACK, IF UNCONTRADICTED AND UNEXPLAINED, IT STANDS AS CONCLUSIVE. (30 Cyc. 1224; note 30 on p. 1225.) A receipt in full of all demands, if unexplained and uncontradicted, will defeat an action on a promissory note given before the date of the receipt. (*Cunningham* v. *Bacchelder,* 32 Me. 316.) Such a receipt in the absence of evidence of fraud, mistake or nonpayment, is a complete bar to the action. (*Virdin* v. *Stockbridge,* 74 Md. 481; *De Arnoud* v. *United States,* 151 U. S. 483; *Jones on Evidence,* 2d ed. Pars. 491 and 492).

In this connection we call the Court's attention to the cases cited in our opening brief, pages 50, 58, 111, and 112 to 114, inclusive.

THE CRITICISM BY THE GOVERNMENT OF CERTAIN CASES IN OUR OPENING BRIEF ON THE QUESTION OF OVERT ACTS, IS ILLOGICAL, AND THEIR SIMILARITY TO THE CASE AT BAR IS HEREIN ONCE MORE SHOWN.

The counsel for defendant in error attack a number of the cases upon which we relied in our brief, notably *United States* v. *Black, United States* v. *Lonabaugh,* and *United States* v. *Kissell.*

In speaking of the Lonabaugh case, they make the statement that it is not in point, because all the

overt acts therein performed occurred well within the three years' limitation period. Their criticism of the other cases cited by us is to the same effect. Such a criticism in no way joins issue with our argument, and in effect begs the question. It is almost droll. Put in the form of a syllogism, their reasoning appears as follows:

> In every case in which the overt acts are committed within the three years' limitation period, the Statute of Limitations will run.
>
> In the case at bar, overt acts were committed subsequent to the three years' limitation period.
>
> Therefore, the Statute of Limitations has not run.

What is this but begging the question? The minor premise here assumed as taken for granted by counsel for defendant in error is the very point in issue. It is not necessary to have made an exhaustive study of formal logic to perceive at a glance the fallacy of this sort of argument. When the learned counsel proves to the satisfaction of the Court, the truth of his minor premise, we will grant the correctness of his reasoning, but not before. We will even give him a little help, if we possibly can, by forming a syllogism for him, leaving him to fill in the blanks.

> Major Premise: .....
> is always an overt act.
>
> Minor Premise: .....
> occurred in the case at bar within three years of the filing of the indictment.
>
> Conclusion: Therefore an overt act occurred subsequent to the three years' limitation period.

We say, without hesitation, that if we could fill out the blanks in the above syllogism we would gladly do so. But we feel certain that they cannot be filled in with propositions that will not in themselves be open to question.

We submit, however, that we have correctly reasoned concerning these cases attacked by the counsel for defendant in error in opening brief, and for the benefit of the Court we will here put that reasoning into the form of a syllogism.

> In the *Lonabaugh* case, *Kissel* case, *Brown* v. *Elliott, United States* v. *Black*, etc., certain acts which we have dwelt on with considerable detail in our opening brief, occurring within three years of the filing of the indictment, were held by the Court not to be overt acts.
>
> In the case at bar, the acts alleged to have been done between May 26th, 1908, and May 31st, 1911, are absolutely analogous to these acts in the cases above mentioned.
>
> Therefore, they were not overt acts in pursuance of the conspiracy, but the results thereof.

The similarity between THE LONABAUGH CASE AND THE CASE AT BAR is so striking that we put excerpts therefrom in parallel columns with a paraphrase of the same features in this case. (This case has been uniformly followed, and approved in *Brown* v. *Elliott,* decided in 1912.)

Lonabaugh Case.

On page 479 of the report Mr. Justice Vandeventer says:

"Of the issuance of the patents little need be said. It was not the acts of one or more of the conspirators, but of the officers of the Land Department at Washington who were acting solely in behalf of the United States. And while it doubtless was induced by what the conspirators had done in giving to the entries a lawful appearance, when they really were fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."

Again, on page 481, we find the Court saying:

"The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, and that object was effected, when as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them considering the antecedent agreement or obligation in pursuance of which the entries were secured."

Justice Vandeventer, then Circuit Judge, continued:

"But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands, but included the transfer of them to the corporations, and until both of these things were done, the object of the conspiracy was not effected. Passing the question whether or not the indictment charges

Case at Bar.

With but little alteration to suit the facts of the case at bar that may be made to read:

"Of the issuance of the check little need be said. It was not the act of one or more of the conspirators, but of the officers of the Navy Pay Department at Seattle. And while it doubtless was induced by what the conspirators had done in giving to their requisition a lawful appearance, when it really was fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."

Paraphrasing this extract to suit the facts of the case at bar, it will read as follows:

"The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of a certain check, and that object was effected when, as a result of the deceit practiced upon the officers of the Navy Pay Office, the check was issued to the defendants in consideration of the antecedent agreement or obligation in pursuance of which the check was secured."

Paraphrasing:

"But it is contended that the conspiracy was not limited to the defrauding of the United States of the check, but included the transfer of it between the conspirators and a subsequent deposit thereof in the bank, and until both of these things were done the object of the conspiracy was not effected. Passing the question whether or not the

the object so broadly, and treating the evidence as sufficient in that regard, we come at once to test that contention in the light of the statute."

* * * * * *

"Section 5440 does not interdict all conspiracies, but only those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," and then only when one or more of the conspirators do some 'act to effect the object of the conspiracy.' It is enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in sense of the statute, is effected."

indictment charges the object so broadly and treating the evidence as sufficient in that regard we come at once to test that contention in the light of the statute.

Every word of the opposite excerpt is applicable to the case at bar.

"Section 5440 does not interdict all conspiracies, but only those whose object is 'either to commit any offense against the United States or to defraud the United States in any manner or for any purpose,' and then only when one or more of the conspirators do some 'act to effect the object of the conspiracy.' It is enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained 'the object of the conspiracy,' in sense of the statute, is effected."

HOUSTON AND BULLOCK v. THE UNITED STATES.

The counsel for the defendant in error has taken great comfort in a recent decision handed down by the Circuit Court of Appeals in the case of *Houston and Bullock* v. *The United States,* not yet reported.

This case is a tacit acknowledgement of the correctness of our contention that the last overt act was

the receipt of the check, because the district attorney deliberately introduced into the indictment in that case allegations that the defendants conspired to defraud the Government out of its legal remedies. Here we have in effect an admission that without such allegation the indictment would have been barred by the statute of limitations.

We have carefully read the opinion of the majority Judges in that case and fail to see the cause of the learned counsel's jubilation therein.

In the Bullock case it was contended that the conspiracy terminated with the letting of the contract, or the making of the award. In that case the checks were issued on August 13, 1908, and the indictment filed August 12, 1911. This, of course, brought the delivery of the check, taking the issuance of the check as the last date, still one day within the statute of limitations. In the majority opinion the Court said: (pages 12-13 Majority Opinion):

> "It is urged that the statute commenced to run on April 21, 1908, the date when the contracts were let for furnishing the coal for Forts Davis and St. Michaels, or that, at the latest, the statute began to run on July 13, 1908, the date when Bullock certified to the vouchers. The object of the conspiracy was alleged to be to defraud the United States, and there was proof of acts done by the defendants, which showed that the purpose of the conspiracy was not fully consummated when the vouchers were certified to. That act was followed by others.

> *On August* 13, 1908, at the instance of Bullock, Baxter issued the checks; on September 1, Kane, under authority from Bullock endorsed the checks on behalf of John J. Sesnon Co., and September 2, the bank paid the checks. The indictment was *found on August* 12, 1911."

In the case at bar the award was made on Wednesday, the 15th of April, 1908. The check was issued on May 26, 1908, and deposited June 2, 1908. The indictment was returned on May 31, 1911.

It is quite evident that the special assistant attorney general, in that case, was of the opinion that these circumstances were a serious hindrance to the prosecution of the case, and hence they were careful to have the indictment charge that the conspiracy embraced a scheme to "bar the United States of its legal remedies to recover moneys of which it was to be defrauded." There is no such charge in the case at bar.

The dissenting opinion, filed by Circuit Judge Ross, states:

> "But the indictment does not charge that the check or warrant therein referred to had any connection with any bid or proposal by the alleged conspirators for the sale to or purchase by the United States of any coal at exorbitant prices by means of pretended and fraudulent competitive bids, or otherwise.
>
> "The present indictment was undoubtedly drawn with the manifest purpose, as I think, of avoiding the bar of the statute of limitations; for, as has been shown, notwithstanding the fact

> that it makes no mention whatever of the making of any bid or proposal by or on behalf of the alleged conspirators or either of them for furnishing and selling to the Government any coal in response to the advertisement of its Quartermaster, or otherwise, yet on the trial the Government introduced evidence not only that the defendants did make such bids for the furnishing and sale to it of the coal advertised for, at exorbitant prices, but that such bids and proposals, while nominally competitive, were really fraudulent and made pursuant to the agreement of the defendants thus to defraud the United States."

In the case at bar, however, the check was issued on May the 26th, 1908, and delivered on that date, and the indictment was not returned until May the 31st, 1911. Therefore, the indictment was filed after the statute of limitations commenced to run. In the Bullock case the checks were issued on August 13th, 1908, but the indictment was found on August 12th, 1911. This, of course, brought the issuance of the check within the three-year statutory period, and therefore, any language concerning the nature of the transaction was clearly *dicta*. But we find therein no language detrimental to our position. The conspiracy itself was totally different. The indictment in particular alleged sufficient acts, and the Court found acts, in pursuance of the conspiracy, in existence as late as 1911, or three years after the issuance of the check. The indictment alleged, not only that the conspiracy was to defraud the

United States of divers large sums of money, but also to deprive the United States of ITS LEGAL REMEDIES TO RECOVER THE MONEYS OF WHICH IT WAS TO BE DEFRAUDED. And it was found that this part of the conspiracy continued up to the very moment on which the indictment was filed.

Again, the conspirators corruptly induced the Quartermaster of the United States Army to issue the check bearing the date of August 13, 1908, and he actually did issue the check after having been corruptly persuaded to issue it.

This is totally different from the facts concerning the issuance of the check in the case at bar. On page 57 of the Government's brief in the present case, it is said that the only two acts in connection with the check, which can in any measure be considered the bona fide acts of the Government, were the act of Paymaster Orr in drafting the check and the act of the bank on June 2, 1908, in cashing it. Yes, but counsel for the Government ignore that the check of Paymaster Orr was dated on May the 26th, 1908.

Hence, if the learned counsel rely upon the Bullock case, this would seem at once to be acknowledgement of the fact that the object of the conspiracy in the case at bar was the issuance of the check, while the object of the conspiracy in the Bullock case could not possibly have been the issu-

ance of the check, because, in order to get what the conspirators in the Bullock case were aiming at, it was necessary for them, as one of the acts in pursuance of that conspiracy, *to corrupt* and induce the Quartermaster of the United States Army to issue the check, in order that they could make the next step forward to their goal. The issuance of the check in the case at bar was the goal. The issuance of the check in the Bullock case was merely a step towards the goal.

Supposing, in the case at bar, the indictment charged that the object of the conspiracy was to obtain the delivery of a mortgage for the materials, or the delivery of a bond, or the delivery of any other instrument in writing—would it be contended that the sale of the mortgage, or exchange of the bond, or other instrument, would be an overt act? The disposal of the article does not add to the crime. The defendants might have purchased a house with the check or the avails thereof, or might not have disposed of it at all. Their subsequent dealings with the check are absolutely immaterial.

Under both the Majority and Dissenting opinions, this case must be reversed.

THE COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING AS EVIDENCE OF UNREASONABLE PROFITS, VARIOUS SALES OF OTHER KINDS AND DESCRIPTIONS OF ZINC TO OTHER PURCHASERS UNDER TOTALLY DISSIMILAR CONDITIONS.

The brief of the defendant in error shows a total misconception of our argument as to the admissibility of the evidence offered at the trial, of sales of zincs at various times from the books of the Great Western Smelting and Refining Company and the W. A. Corder Company.

The indictment charged with respect to sales of zinc that the object of the conspiracy was that the United States should purchase zinc rolled sheets and boiler plates at a price *greatly in excess of its real value,* and the *conspirators should obtain unreasonable profits,* etc. To prove this, the Government offered in evidence sales of various zincs of VARIOUS KINDS and DESCRIPTIONS, varying entirely from the KINDS AND SIZES OF ZINCS SOLD to the Government in the transaction in question.

And it further appeared from his testimony that supplies to the navy yard had to be shipped in an unusual and peculiar manner. We append below a table which we have compiled after a careful analysis of Mr. House's testimony, showing the dates, amounts, prices, description and purchasers of various zincs sold by the Corder Company or the Great Western Smelting and Refining Company, to show that these sales did not take place under the conditions, or under the same circumstances, as the sale of the zinc in question to the navy yard. This table follows:

THE ZINCS IN REQUISITION No. 438 WERE 1 x 6 x 12 in. SIZE.

Date.	Amt.	Price.	Description.	Purchaser.	Remarks.
Sept. 4,'07	4587 lb	@ 9.50—435.77 Cartage 1.00 Total 436.77	Zinc Plates	John Sims Met. Wks.	Tr. p. 542 jobbers.
Sept. 4,'07	1036 lb	@ 9.55—958.44 Cartage 3.00 961.44	Zinc Plates	Pac. Engineering Co.	Tr. p. 542 jobbers.
Nov.20,'07	3992 lb	@ 9¼c—369.26	8 bxs. zinc plates ½ x 6 x 12	John Sims Met. Wks.	Tr. p. 543
Dec. 3, '07	3713 lb	@10¼c—380.58	9 rolls zinc plates ½ x 24 x 36 9 rolls: ½ x 24 x 48 9 rolls: ⅝ x 24 x 36	U. S. Navy Pay Office Order 58 N. S. F.	Sales sheet of W. A. Corder Co. Tr. 545 G. W. S. Co. ½ profit
Dec. 30,'07	1058 lb	@ 11c— 116.36	9 cases ½ x 34 x 36 ½ x 24 x 36 rolled zinc plates	U. S. Navy Pay Office Order #66 N. S. F.	Sales sheet Corder Co. Tr. p. 547
Dec. 30,'07	2848 lb	@ 11c— 341.88 @ 12c	11: ½ x 24 x 36 @ 11c ½ x 24 x 36 @ 12c	U. S. Navy Pay Office	W. A. Corder Co. Tr. p. 547
Dec. 27,'07	4421 lb	@ 11c— 486.31	½ x 24 x 36	" " U. S. N. P. O.	W. A. Corder
Dec. 27,'07	5084 lb	@ 11c— 559.24	½ x 24 x 36	U. S. N.	W. A. Corder
Dec. 3, '07	1125 lb	@10¼c—115.31	1 x 6 x 12	Lewis, Anderson, Ford Co.	W. A. Corder jobbers, Tr. p. 549

Attention is called to the sales of December 27, 1907, in the table, where sales of zinc of the size of ½ x 24 x 36 were made; to the date of December 3, 1907, where sales of zincs of ½ x 48 and of ⅝ x 24 x 36 were made; the prices on these vary. The zincs supplied to the navy yard on requisition No. 438 were 1 x 6 x 12, a totally different size plate, and it is reasonable to suppose that the prices thereon would not be the same as the prices quoted in the table above.

It is needless here to repeat the cases in support of this proposition, because they are given in our opening brief, and the rule of evidence is well settled that the evidence of values is inadmissible, unless the sales are of similar articles, under similar conditions and similar circumstances.

This error was highly prejudicial, as it made the jury believe that we had obtained unreasonable prices, whereas, in fact, this was not so. And Mr. House, being merely an expert accountant, was incompetent to testify to any of these sales, under any circumstances, he not being a dealer, or engaged in a similar business.

A CAUSE OF ACTION FOR FRAUD ACCRUES WHEN THE SALE AND TRANSFER OF THE PROPERTY FRAUDULENTLY BARGAINED FOR IS COMPLETED, REGARDLESS OF THE DATE UPON WHICH PAYMENT IS MADE.

Since writing our opening brief, we have come across a number of additional cases in support of the above proposition. These cases uniformly hold that where property is fraudulently sold to another, the cause of action commences at the moment the sale is entered into, regardless of the fact that no damage is done to the defrauded purchaser, until he pays the money. It is stated in these cases that no regard is paid to the time when the actual damage results. But the defrauded purchaser has a right of action, regardless of the pecuniary loss which is suffered by him after payment of the money.

In the recent case of *Ball* v. *Gerard,* 146 N. Y. S. 81, decided in February, 1914, the plaintiff was induced by the defendants to subscribe on December 1, 1906, for stock in a corporation, which subscription was thereupon accepted, and to pay one-half of the price on that date, and the balance on March 1, 1907. The Court held that limitations ran against a right of action for damages from December 1, 1908, the falsity of the representations existing then, if at all, and the plaintiff being then deprived of the value of his contract. The Court, speaking through Judge Clarke, said:

> "In the case at bar the sale was completed when the contract was made. Reciprocal rights then became fixed. It made no difference that a subsequent part payment was to be made or that certificates were to be delivered. The con-

tract had been made. Either party would have been entitled to sue upon a breach by the other. It was the value of this contract which the plaintiff was entitled to. It was this contract which had been made upon reliance upon the false and fraudulent representations alleged, and it was the damage, caused to the plaintiff by the subject-matter of this contract not being as represented, for which he sues.

"In *Miller* v. *Wood*, 116 N. Y. 351, 22 N. E. 553, the Court said:

'The defendants by false and fraudulent representations, induced the plaintiff to purchase a mortgage which was without actual value. The sale was consummated on the 12th day of April, 1878. On the 23d day of September, 1885, a little over seven years after the purchase, the plaintiff commenced this action by means of which she sought to recover the amount of damages sustained by reason of the fraud practiced upon her by these defendants. The trial court rightly determined the plaintiff's claim to have been barred by the statute of limitations prior to the commencement of this action. The cause of action accrued to plaintiff when the sale and transfer were completed, to-wit: April 12, 1878.'

"Here again is a real estate transaction and required to be evidenced by a written instrument, and of course for purposes of litigation the execution and delivery of that instrument fixed the time."

In *Wilcox* v. *The Executors of Plummer*, 4 Pet. 172, 7 Law. Ed. 821, it was held that the statute of limitations commences to run from the time the

action accrues, regardless of the time that the damage was developed or became definite. The Court adopted as its decision the view of Mr. Daniel Webster, who was counsel in the case. A part of Mr. Webster's argument, as reported in 7 Law Ed., is as follows:

> "The law regards the time when the cause of action arises, not the time when the degree of injury, more or less, is made manifest; and when the cause of action is a breach of promise or neglect of duty, the right to sue arises immediately on that breach of promise or neglect of duty; and this right to sue is not suspended until subsequent events shall show the amount of damage or loss. This may be shown at the time of trial; or, indeed, if it be not actually ascertained at the time of trial, the jury must still judge of the case as they can, and assess damages according to their discretion.
>
> "A rule different from this would be attended with one of two consequences—either no action could be brought in such a case until the full amount of injury was ascertained, or a fresh and substantive cause of action would arise on every new addition to the probability of loss."

In *Aachen & Munich Fire Ins. Co.* v. *Morton,* 156 Fed. 656 (C. C. A.), the Court, speaking through Circuit Judge Lurton, said:

> "But, passing the question without express decision, we think that relief must be denied, because plaintiff's right of action arose more than six years before this suit was begun. A

> right of action accrues whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will give a right to then bring and sustain a suit. That the statute begins to run from the time that a right of action accrues, without regard to when the actual damage results, is well settled. 26 Cyc. 1065, 1069, 1116, and cases there cited: *Wilcox* v. *Plummer,* 4 Pet. 172, 7 L. Ed. 821."

We contend that the defendant in error has failed to refute our arguments in its reply brief. We therefore pray the Court to grant us the relief asked for in our opening brief, namely, that the judgment be reversed.

Respectfully submitted,

KERR & McCORD,
MORRIS & SHIPLEY,
A. R. BLACK,
BERT SCHLESINGER.